

**EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT TRIBUNALS (CONSTITUTION AND RULES OF
PROCEDURE) (AMENDMENT) REGULATIONS 2012**

2012 No. 468

1. This explanatory memorandum has been prepared by the Department for Business, Innovation & Skills, and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861). Specifically, the Order increases the limit at which deposit and cost orders can be made, provides that any written witness statement of a person giving oral evidence should stand as evidence in chief, introduces a judicial power to direct payment of witness expenses and disapplies inconsistent rules for the handling of a small number of national security cases by Employment Tribunals.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 In 'Resolving Workplace Disputes: Government Response to Consultation' the Government undertook to commission a fundamental review of employment tribunal rules, such review to be conducted by an independent and judicially-led Working Group. The rules review is expected to produce recommendations for a revised procedural code by the end of April 2012. Alongside the work of that review, however, and following its earlier wide-ranging consultation, the Government confirmed that it would make the necessary legislation to amend the Employment Tribunals Rules of Procedure in certain specific respects. This Order amends the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 to that effect. Additionally, the opportunity has been taken to resolve an inconsistency between the administrative and judicial procedures for handling certain national security cases.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 The Minister for Employment Relations, Consumer and Postal Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012 are compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 The Government's key objective is to support and encourage parties to resolve disputes earlier but, where parties need to come to an employment tribunal, to ensure that the process they face is as swift and efficient as possible.

7.2 As well as commissioning Mr Justice Underhill to lead a thorough review of all existing rules in Schedule 1 of the 2004 Regulations (as amended), the Government committed to bringing forward the necessary Order to effect certain specific changes. Those rule changes are outlined below.

Deposit Orders

7.3 Currently deposit orders, which require a party (either claimant or respondent) to pay a sum of up to £500 as a condition of being permitted to continue to pursue all, or any part, of their respective claim/response, can be made where a judge considers that any contentions put forward by a party have "little reasonable prospect of success". The amendment under these Regulations increases that £500 cap to £1000. Otherwise, the underlying procedure remains unchanged.

Costs Awards

7.4 Applications for costs (in Scotland, expenses) can be made at any time during the proceedings. The current maximum sum that tribunals have the power to award for costs is £10,000. Where costs are likely to exceed that upper limit, and an employment tribunal wants to ensure such costs are awarded, it is currently necessary to transfer the matter to a civil court for consideration. Such transfers can be cumbersome and time-consuming. These Regulations increase that upper limit to £20,000. Again, the underlying process remains unchanged.

Witness Statements

7.5 In most employment tribunals, written witness statements are read aloud during the hearing so as to place the evidence-in-chief formally on the record. In Scotland, following its particular legal tradition, witness statements

are not widely used, though Employment Judges have the same powers to require the preparation and exchange of witness statements.

7.6 In a recent decision of the Employment Appeal Tribunal (*Mehta v. Child Support Agency* [2010] UKEAT/0127/10/CEA), it was held that it was not a requirement of fairness in every case that the witness statements should be read aloud, but there might, in particular cases, be good reason for a witness statement being read aloud. But the *Mehta* judgment is not the same as a formal statutory rule.

7.7 These Regulations therefore amend the rules of procedure so that witness statements must be “taken as read”, unless the tribunal directs otherwise.

Witness Expenses

7.8 In certain circumstances, the State will reimburse some of the travelling costs and other expenses incurred by parties and their witnesses attending a hearing to give evidence. Following the “Resolving Workplace Disputes” consultation, the Government decided that it would cease to fund payments of expenses in this way. However, to ensure consistency with the wider civil justice system, these Regulations give powers to Employment Judges and tribunals to direct a party to make a payment to a witness in respect of some or all of the expenses incurred for the purpose of, or in connection with, their attendance at the tribunal; and enable such disbursements to be considered in the context of any costs awards made for or against either party during the proceedings.

Administrative arrangements

7.9 Rule 61(8) requires judgments and reasons in some Equality Act cases to be sent automatically to the Commission for Equality and Human Rights as an administrative process. Under rule 54(4), the tribunal or Employment Judge has a duty to ensure that information is not disclosed contrary to the interests of national security. In order to provide consistency in what are, effectively, administrative arrangements, the requirement in rule 61(8) has been qualified so that a case in which proceedings took place subject to rule 54 is similarly protected in those administrative arrangements. This qualification only applies to those national security cases in which one of the security and intelligence agencies is a party.

Consolidation

7.10 This Order amends the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004, but the Government does not intend to consolidate the legislation. The rules review is expected to produce recommendations for a revised procedural code by the end of April 2012.

8. Consultation outcome

8.1 The Government published 'Resolving workplace disputes: A consultation' on 27 January 2011 and the consultation closed on 20 April 2011. The Government response was issued on 23 November 2011.

8.2 Over 400 responses to the consultation were received; about 25% from individuals, about 33% from businesses and their representative organisations, and the remainder from trade unions, Government agencies, charities, legal representatives and others.

8.3 The Government has set out detailed analysis of the responses from the consultation in its response to the consultation which was published in November 2011. In summary the responses to the consultation which were received provided broad support:

- 237 consultees answered the question about doubling the current £500 cap on Deposit orders: 54% were in favour and 41% against.
- Of the 227 respondents commenting on whether the Costs limit should double to £20,000, 56% agreed and 43% were opposed.
- 210 consultees provided views on whether hearings were unnecessarily prolonged by witnesses having to read statements aloud: 56% agreed and 39% disagreed.
- Government invited views on the proposal to remove the payment of expenses to ET parties and witnesses, 197 responses were received: 51% were supportive and 47% opposed.

8.4 The Government's clear view is that tribunals should have the flexibility to manage their caseload in the most efficient and effective manner. Accordingly, and notwithstanding the wider review of rules led by Mr Justice Underhill, the Government has decided to make an Order to the effect that the limit for deposit orders and costs awards be increased, that (as a default position) any witness statements of a person giving oral evidence should stand as evidence in chief; and to give employment tribunals the power to order the payment of witness expenses by a party.

8.5 The provision set out in rule 61(10) was not within the ambit of the Resolving Workplace Disputes consultation and as an administrative measure, did not warrant a public consultation of its own.

9. Guidance

9.1 The Department is not providing any guidance or publicity in relation to this Order as it does not impose any new obligations.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment in relation to the changes arising from the Resolving Workplace Disputes consultation is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website. The Impact Assessment deals with the amendments to the Employment Tribunal Rules at pages 62 - 74.

10.4 No Impact Assessment was prepared in respect of the amendment to Rule 61.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is not to exempt them from the legislation. This is because the legislation has net benefits for business. The basis for the final decision on what action to take to assist small business is set out in the Impact Assessment.

12. Monitoring & review

12.1 Management information, annual statistics and financial accounting data arrangements are already in place across HMCTS. Unit costs for 2010/11 are currently being developed and will be monitored after these proposals take effect. Furthermore, BIS is looking at the feasibility of running surveys of employment tribunal applicants (SETA survey) in or around 2012 and/or 2016.

13. Contact

Gail Davis at the Department for Business, Innovation and Skills, Tel: 020 7215 3589 or email: gail.davis@bis.gsi.gov.uk, can answer any queries regarding the instrument.